IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2017 OF 2007

WITH

WRIT PETITION NO.2018 OF 2007

Rakesh N.Dutt, 101, Mayfair, 197, Kane Road, Band Stand, Bandra (W), Mumbai - 400 050. ..Petitioner.

V/s.

1. Asstt. Commissioner of Income-tax, Room No.455, 4th Floor, Aaykar Bhavan, Mumbai.

2. Deputy Commissioner of Income-Tax-10(1), Mumbai having his office Room No.455 4th Floor, Aaykar Bhavan, M.K.Road, Mumbai-400 020.

3. Commissioner of Income-Tax -10(1), Mumbai having his office Room No.516 5th Floor, Aaykar Bhavan, M.K. Road, Mumbai-400 020.

4. Union of India, Through Ministry of Finance, North Block, Central Secretaeiat, New Delhi. ..Respondents.

Mr.S.N.Inamdar, Advocate with Mr.K.Gopal and Mr. Jitendra Singh i/b. Inter Asia Lawyers for petitioner in both the petitions.

Mr.Vimal Gupta with P.S.Sahadevan for respondents in both the petitions.

CORAM : F.I.REBELLO AND
J.P.DEVADHAR, JJ.

DATED : 24TH OCTOBER, 2007.

ORAL JUDGMENT (PER J.P.DEVADHAR, J.)

1. These two petitions are filed to challenge two notices issued under section 148 of the Income Tax Act, 1961 ('Act' for short) both dated 20th December, 2006 relating to the assessment year 1997-98 and 1998-99.

2. The petitioner is engaged in the business of distribution of Indian made foreign liquor. The petitioner ('assessee' for short) carried on business in the name of his proprietary concern M/s.Avadh Liquors. On 12/8/1998 a search action under section 132 of the Act was carried out at the business premises of the assessee. During the course of search statement of the assessee was recorded under section 132(4) of the Act to the effect that the assessee has admitted undisclosed income of Rs.1.25 crores for the block assessment year 1-4-1988 to 12/8/1998. The assessee retracted the said statement recorded on 12/8/1998 by filing an affidavit on 13/8/1998. However, on the basis of the above statement and other documents found during the course of search, block assessment proceedings were initiated. The petitioner filed Nil return for the Block period 1/4/1988 to 12/8/1998.

3. On 11/2/2000, the assessing officer passed a block assessment order assessing income at Rs.90 lacs by treating the entire credit entries of seven parties which were claimed to have been received towards share application money of the two companies namely, M/s.Dutt Marketing Pvt. Ltd. and M/s.Golden Cellar Pvt. Ltd. in which the assessee is a director, as undisclosed income of the assessee.

4. The assessee filed an appeal against the said order and the first appellate authority passed by the order dated 15/3/2001 confirmed the order passed by the assessing officer. On further appeal filed by the assessee, the Tribunal by its order dated 21/4/2005 allowed the appeal filed by the assessee and deleted the additions of Rs.90 lacs made as undisclosed income of the assessee during the block period.

5. By the impugned notices both dated 20/12/2006 issued under section 148 of the Act, the assessing officer sought to reopen the assessment for the assessment years 1997-98 and 1998-99. It may be noted that regular assessments for A.Y. 1997-98 and

198-99 were completed under section 143(3) of the Act on 30/3/2000 and 23/3/2001 respectively. The reasons recorded for the assessment year 1997-98 read as follows:-

"**Shri Rakesh Dutt - Assessment Year - 1998-98**

The assessee is a proprietor of M/s.Avadh Liquors engaged in the business of distribution of IMFL. He is also one of the directors of M/s.Dutt Mktg. Pvt Ltd. and/s Golden Cellar Pvt.Ltd. mainly trading IMFL. There was a search action u/s.132 of the Income Tax Act, 1961 on 12/8/1998 at the residence and business premises of the assessee. Block assessment for the period 1.4.88 to 12.8.98 was completed in this case on 11.2.2000, determining a total undisclosed income at Rs.90 lacs as against Nil return. In the block assessment, a sum of Rs.90 lacs had been treated as undisclosed income on the basis of assessee's statement wherein the assessee said to have admitted that he had paid cash of Rs.90 lacs against the cheques received from seven parties which he had invested in two companies namely Dutt Marketing and Golden Cellar Pvt. Ltd. The Assessing Officer treated the entire credit entries of seven parties reflected in the books of accounts of two companies where the assessee is a director, as unexplained cash credit u/s. 68 of the Income Tax Act, 1961.

On appeal, the ld. CIT(A) confirmed the above addition. However, on appeal filed by the assessee, the Hon'ble ITAT has deleted the addition holding that in the instant case the receipts of loan and share application money is total from 7 parties are fully entered in the regular books of accounts of the two companies M/s.Dutt Mktg.Pvt. Ltd. and/s Golden Cellar Pvt. Ltd. Therefore, the same cannot be assessed in the block assessment. However, there is a finding in the order by the Hon'ble ITAT. The finding is that the provision of section 68 to 69(c) may not in a block assessment possible be available to be applied appropriately to the income / money / transaction simpliciter i.e., when the same is recorded in regular books of accounts and in such a situation the said income may be taken into account

as non genuine / bogus transaction of law / share application money and in turn may be added as assessee's own money / income, by applying the aforesaid provision of law in a regular assessment u/s.143(3).

In view of this finding by the Hon'ble ITAT, the investment made by the assessee in the above mentioned two companies in the form of share / share application money should be assessed in the hands of the assessee for A.Y. 1997-98.

In view of the above, I have reason to believe that chargeable to tax has escaped assessment coming within the meaning of section 147 read with proviso thereto, by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for the Assessment Year 1997-98. "

Similar reasons were recorded in respect of A.Y. 1998-99.

6. The assessee objected to the reopening of the assessments on various grounds set out in letters both dated 28/3/2007. However, the objection raised by the assessee were rejected. On a writ, this Court remanded the matter back to the assessing officer for reconsideration of the objections filed by the assessee. On remand, the assessing officer by the impugned orders once again rejected the objections raised by the assessee. Hence these two petitions are filed challenging the reopening of the assessment for AY 1997-98 and 1998-99.

7. Mr.Inamdar, learned counsel appearing on

behalf of the assessee submitted that the impugned notices issued beyond the period of 6 years from the end of the relevant assessment years are barred by limitation and, therefore, invalid. Mr.Inamdar further submitted that from the reasons recorded it is clear that the assessment is sought to be reopened on the basis of the observations made by the I.T.A.T. in its order dated 21/4/2005 relating to the block assessment for the block period 1/4/1988 to 12/8/1998. Mr.Inamdar submitted that on perusal of the order of the I.T.A.T. it is seen that the finding given therein is that the undisclosed income, if any, could be considered in the hands of the two companies in which the assessee is a director and not in the hands of the assessee. Mr.Inamdar further submitted that in the present case, neither the Tribunal has given any direction to make additions in the hands of the assessee under section 150(1) of the Act, nor any such direction could be given beyond the period of limitation prescribed under the Act. Relying upon a decision of this Court in the case of **Lotus Investments Ltd. V/s. G.Y.Wagh, Assistant Commissioner of Income Tax & Ors.** reported in **288 I.T.R. 459**, Mr.Inamdar submitted that the impugned notices issued under section 148 of the Act are liable to be quashed and set aside.

8. Mr.Gupta, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the I.T.A.T. in its order dated 21/4/2005 has categorically held in para 17 of its Judgment that income arising out of the transaction covered under section 68 to 69C cannot be taxed in block assessments and addition in such cases can be done only in regular assessments. In the present case, the regular assessments for AY 1997-98 and 1998-99 were already made and, therefore, the reassessment proceedings have been validly initiated by invoking the provisions of section 150(1) of the Act. Mr.Gupta further submitted that in the present case, block assessment order was passed on 11/2/2000 and, therefore, the impugned notices issued within 4 years from the date of block assessment would be within the time limit prescribed under section 149 of the Act. Accordingly, Mr.Gupta submitted that there is no merit in these two petitions and the same are liable to be dismissed.

9. We have carefully considered the rival submissions. The short question to be considered in these two Writ Petitions is, whether the I.T.A.T. in its order dated 21/4/2005 has given any finding or direction to tax the undisclosed income of Rs.90 lacs in the regular assessments as contemplated under

section 150 of the Act ?

10. In the present case, on the basis of the material gathered during the course of search conducted on 12/8/1998 the block assessment proceedings were initiated. In the block assessment order, addition of Rs.90 lacs was made as undisclosed income of the assessee by treating the entire credit entries of seven parties which were claimed to be the share application money in respect of two companies, namely, M/s.Dutt Marketing Pvt. Ltd. and M/s.Golden Cellar Pvt. in which the assessee is a director.

11. The I.T.A.T. held that the provisions of section 68 to 69C may not apply to block assessment proceedings and where the transactions recorded in the regular books / accounts are treated as non genuine / bogus transaction of loan etc. by applying the provisions of section 68 to 69C, then income arising from such transactions may be added as assessee's own money / income in the regular assessment under section 143(3) of the Act and not under the block assessment. The I.T.A.T. further held in para 19 as follows:-

> " There appears one more situation in favour of assessee. As the credits appear in the books of M/s.Dutt Marketing Pvt. Ltd. and M/s.Golden Cellar Pvt. Ltd., the addition,

> if at all be permissible legally, the same could be considered in the hands of those two companies only and not in the hands of present assessee. Besides, the legal presumption available u/s. 132(4A) of the Act will also betray the department in as much as the presumption is regarding the correctness of the contents of the entries and this will consequentially imply that the entries of loans taken from two parties are in fact loans from those two parties, and so also the receipts of share application money from 5 parties are in fact such receipts from the said parties. "

12. Thus, it is clear that what is held by the Tribunal is that additions by way of undisclosed income by applying the provisions of section 68 to 69C cannot be made in a block assessment and the same can be made in the regular assessments, however, in the present case, the addition of Rs.90 lacs, if at all permissible legally, the same could be considered in the hands of the two companies and not in the hands of the assessee. In other words, the finding recorded by the Tribunal is that the undisclosed income arising on application of the provisions of section 68 to 69C though taxable in the regular assessment, in the facts of the present case, amount of Rs.90 lacs if at all taxable, it would be in the regular assessment of the two companies and not in the regular assessment of the assessee.

13. In view of the above categorical finding recorded by the I.T.A.T. the contention of the revenue

that the Tribunal has given a finding or direction to the effect that the amount of Rs.90 lacs are liable to be taxed in the regular assessments of the assessee cannot be accepted. Consequently, reopening of the assessments by invoking the provisions of section 150 of the Act cannot be sustained. Once it is held that section 150 of the Act is not applicable, then the reopening of the assessment beyond the period of 6 years from the end of the relevant assessment year would be time barred.

14. In this view of the matter, the impugned notices both dated 20/12/2006 are quashed and set aside.

15. Rule is made absolute in the above terms with no order as to costs.

(F.I.REBELLO, J.)

(J.P.DEVADHAR, J.)